

In the Matter of the Application of)
FIRST COMMUNICATIONS, LLC)
For a Certificate of Authority)

DECISION AND ORDER NO. 23499

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Chief Clerk, Public Utilities
Commission, State of Hawaii.

Commission, State of Hawaii.
Karen Higzel.

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of)	
FIRST COMMUNICATIONS, LLC)	Docket No. 2006-0471
For a Certificate of Authority)	Decision and Order No. 23499
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DECISION AND ORDER

By this Decision and Order, the commission: (1) grants FIRST COMMUNICATIONS, LLC ("Applicant") a certificate of authority ("COA") to provide intrastate telecommunications services within the State of Hawaii on a resold basis subject to certain conditions, as described herein; and (2) waives the requirements of Hawaii Revised Statutes ("HRS") §§ 269-7(a), 269-17, and 269-19 and Hawaii Administrative Rules ("HAR") §§ 6-61-101 and 6-61-105, to the extent applicable, with respect to Applicant's supplemental request for approval of an anticipated change in ownership of Applicant, subsequent to its obtaining a COA in this docket.

I.

Background

A.

Application

On December 7, 2006, Applicant, an Ohio limited liability company authorized to transact business in Hawaii as a foreign limited liability company, filed an application seeking a

COA to provide intrastate telecommunication services in the State ("Application").¹ Specifically, Applicant intends to offer resold interexchange, long distance, and toll services to customers on a statewide basis.²

Applicant claims that it is fit, willing, and able to provide the proposed services. Moreover, Applicant maintains that approval of Applicant's request for a COA is in the public interest. In particular, according to Applicant, customers of telecommunications services in Hawaii will receive the benefits of downward pressure on prices, increased choice, improved quality of service and customer responsiveness, innovative

¹Applicant served copies of the Application on the DIVISION OF CONSUMER ADVOCACY, DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS ("Consumer Advocate"), an ex officio party to all proceedings before the commission. See HRS § 269-51; HAR § 6-61-62.

With its Application, Applicant also filed an "informational filing," which explained that, upon approval of a COA to Applicant, Applicant intends to acquire the customer bases of two telecommunications service providers that are authorized to provide service in the State -- Acceris Management and Acquisition LLC ("Acceris") and New Access Communications LLC ("New Access"). Applicant later confirmed that the only assets that will be transferred in this proposed transfer transaction are the customers of Acceris and New Access. See Letter from Applicant to the commission, filed on January 8, 2007. Applicant further represented that, following the transfer of customers, Acceris and New Access will cease operations in Hawaii and surrender their COAs. Based on Applicant's representations, the commission finds that the proposed transfer of customers from Acceris and New Access to Applicant does not require commission approval. See In re Startec Global Licensing Co. and Teligent Servs., Inc., Docket No. 04-0275, Decision and Order No. 21500, filed on December 20, 2004; In re Cable & Wireless USA, Inc. and Primus Telecommunications, Inc., Docket No. 02-0349, Decision and Order No. 19779, filed on November 18, 2002.

²Application, Sections VIII, IX, and X.

service offerings, and access to increasingly advanced telecommunications technology.³

B.

Consumer Advocate's Statement of Position

On January 11, 2007, the Consumer Advocate filed its Statement of Position ("CA's Statement of Position"), informing the commission that it does not object to commission approval of Applicant's request for a COA, provided that: (1) Applicant modifies its tariff in accordance with the Consumer Advocate's recommendations;⁴ and (2) Applicant submits a copy of its most recent financial statements, as required under HAR § 6-80-17(c)(1)(E), subsequent to the issuance of a protective order.⁵ Based on the information provided by Applicant in support of the Application, the Consumer Advocate accepted Applicant's representations that Applicant has the managerial and technical abilities to provide the proposed services. In addition, the Consumer Advocate contended that Applicant's

³Application, Exhibit E.

⁴On January 22, 2007, Applicant filed an updated tariff in which it incorporated the changes recommended by the Consumer Advocate in its Statement of Position.

⁵In this regard, the Consumer Advocate stated that it had not received copies of Applicant's financial documents, which were filed under seal by Applicant and attached as Exhibit C to the Application, presumably because a protective order has not been filed in this proceeding. See CA's Statement of Position, at 3. Upon request by commission staff, Applicant and the Consumer Advocate have since submitted a Stipulation for Protective Order, which was approved by the commission as Protective Order No. 23429, filed on May 11, 2007. On June 15, 2007, Applicant submitted its confidential financial statements to the Consumer Advocate under Protective Order No. 23429.

services will provide increased competitive choices, and that the entry of many telecommunications service providers in Hawaii's market serves to mitigate many traditional public utility regulatory concerns that may be associated with the approval of the requested COA.

The Consumer Advocate, however, recommended that the commission, on its own motion, grant the following waivers to be consistent with previous decisions and orders:

1. Waive the requirement that a telecommunications carrier maintains its financial records in conformance with the uniform system of accounts, instead allowing the carrier to maintain financial records in accordance with generally accepted accounting principles (HRS § 269-8.5).
2. Waive the requirement that all records and books pertaining to the telecommunications carrier's intrastate operations be located in Hawaii, instead allowing the carrier to promptly provide copies of its out-of-state records and books upon request (HRS § 269-8.2); and
3. Waive the requirement subjecting telecommunications carriers to rate of return regulation and public and contested case hearings on proposed rate increases, except that this waiver would not apply to basic service in high cost areas provided by carriers receiving state or federal universal service fund subsidy or to non-competitive services (HRS § 269-16).

The Consumer Advocate contended that granting such waivers would be consistent with HAR § 6-80-136. The Consumer Advocate additionally argued that, consistent with HAR § 6-80-136, Applicant should be required to: (1) file a separate tariff for each proposed new service; (2) maintain its financial records in

accordance with generally accepted accounting principles; (3) timely make its records and books pertaining to its intrastate telecommunications operations in the State available upon the requests of the commission and the Consumer Advocate; and (4) comply with other exception requirements set forth in the subject rule that are not waived.

C.

Applicant's Supplement to the Application

On February 14, 2007, Applicant filed a supplement to its Application, in which Applicant requested that commission approve a change in ownership of Applicant that is expected to occur shortly after Applicant is issued a COA. More specifically, Applicant explained that it is currently owned by McKinley Communications, LLC (which holds 51% ownership), First Energy Corp. (which holds 32% ownership), and Boich Investment Group, Ltd. (which holds 17% ownership).⁶ Applicant currently does not have a parent company. However, Applicant anticipates that, after the commission approves Applicant's request for a COA, ownership of Applicant will be transferred to a new parent company, First Communications, Inc. ("First-Parent"). According to Applicant, for administrative convenience and in order to meet critical business objectives, Applicant filed its Supplemental Application as an amendment to its Application to seek commission

⁶See Supplement to Initial Application ("Supplemental Application"), filed on February 14, 2007, at 1.

approval of the anticipated change in ownership concurrently with its request for a COA in this docket.⁷

Applicant also noted that the commission recently waived the requirements of HRS §§ 269-7(a), 269-17, and 269-19 for a transfer of control of Lightyear Network Solutions, LLC ("Lightyear") to First-Parent in Docket No. 2006-0462.⁸

D.

Consumer Advocate's Supplemental Statement of Position

On February 23, 2007, the Consumer Advocate filed a Supplemental Statement of Position ("CA's Supplemental Statement of Position"), which informed the commission that it does not object to Applicant's supplemental request for approval of the change in ownership of Applicant to First-Parent. In the alternative, the Consumer Advocate recommended that the commission, on its own motion, waive the approval requirements of HRS §§ 269-7(a), 269-17, and 269-19, pursuant to HRS § 269-16.9 and HAR § 6-80-135.

⁷See id. at 2.

⁸See Order No. 23199, filed on January 16, 2007, in Docket No. 2006-0462. As discussed in Order No. 23199, Docket No. 2006-0462 involved a proposed transfer of control of Lightyear, Applicant, and Xtension Services, Inc. ("Xtension") to First-Parent. At the time of filing the application in Docket No. 2006-0462, because Applicant and Xtension were not yet authorized to provide telecommunications services in Hawaii, the request for approval of the proposed transfer of control was made only with respect to Lightyear. Applicant, however, has since informed the commission, that "Lightyear is no longer a party to the Transfer of Control [in Docket No. 2006-0462], so that the only entity under jurisdiction of the Commission will be [Applicant], which is not yet certified, but will be in the future." Supplemental Application, at 2.

The Consumer Advocate specifically found that the proposed transfers of ownership in Applicant's Supplemental Application in this docket and in Docket No. 2006-0462 are similar and related for the following reasons:

- Both Lightyear⁹ and Applicant would have commission-authorized COAs to provide telecommunications service in Hawaii;
- The ownership of both Lightyear and Applicant would transfer to the same parent, First-Parent;
- The proposed transfers of Lightyear and Applicant to First-Parent would not result in any transfer of certificates, and would be transparent to customers (i.e., the same rates, terms, conditions, and management of both companies would continue after the transfers); and
- Both the application filed in Docket No. 2006-0462 and Applicant's Supplemental Application in this docket were filed in anticipation of First-Parent's shares being admitted to trading on the Alternative Investment Market of the London Stock Exchange in March 2007.

CA's Supplemental Statement of Position, at 3.

Based on the foregoing, the Consumer Advocate stated that its findings provided in its Statement of Position filed on December 20, 2006, in Docket No. 2006-0462 applied to Applicant's supplemental request for approval of a change in ownership of

⁹The Consumer Advocate believes that, although Lightyear is no longer a party to the transfer of control that is the subject of Docket No. 2006-0462, its findings in that docket on First-Parent's qualifications for taking control or ownership of a subsidiary are still relevant to Applicant's request for approval for a change in ownership in this docket due to the similarities of the transferred subsidiaries and identical new parent. See CA's Supplemental Statement of Position, at 4 n.2.

Applicant to First-Parent, and result in the following conclusions:

- First-Parent has the technical, managerial, and financial qualifications to take over the ownership of Applicant;
- The proposed change in ownership of Applicant is in the public interest and will not have a material adverse effect on its utility operations;
- The proposed acquisition involved with the proposed change in ownership of Applicant will not result in any negative market share impact to the telecommunications marketplace in Hawaii;
- Applicant will provide competitive services, and be a non-dominant carrier;
- The proposed change in ownership of Applicant to First-Parent is in the public interest, and competition, in this instance, will serve the same purpose as public interest regulation.

CA's Supplemental Statement of Position, at 4.

II.

Discussion

A.

COA

HRS § 269-7.5 prohibits a public utility from commencing business in the State without first obtaining a certificate of public convenience and necessity ("CPCN") from the commission.¹⁰ HAR § 6-80-18(a) states that:

¹⁰On June 3, 1996, HAR chapter 6-80 took effect. HAR chapter 6-80, among other things, replaced the CPCN with a

The commission shall issue a certificate of authority to any qualified applicant, authorizing the whole or any part of the telecommunications service covered by the application, if it finds that:

- (1) The applicant possesses sufficient technical, financial, and managerial resources and abilities to provide the proposed telecommunications service in the State;
- (2) The applicant is fit, willing, and able to properly perform the proposed telecommunications service and to conform to the terms, conditions, and rules prescribed or adopted by the commission; and
- (3) The proposed telecommunications service is, or will be, in the public interest.

Upon review of the record herein, the commission makes the following findings pursuant to HAR § 6-80-18(a):

1. Applicant possesses sufficient technical, financial, and managerial resources and abilities to provide the proposed services, as evidenced by the description of the qualifications of Applicant's key management personnel and the financial statements submitted in support of its Application.¹¹

2. Applicant is fit, willing, and able to properly perform the telecommunications services and to conform to the terms, conditions, and rules prescribed or adopted by the commission, as evidenced by Applicant's representations and the documents submitted in support of its claims. Moreover, the

COA for telecommunications carriers, and established procedures for requesting and issuing a COA.

¹¹As addressed above, Applicant provided its financial statements to the Consumer Advocate, subject to Protective Order No. 23429, on June 15, 2007.

commission's grant of a COA to Applicant to provide the proposed services will be conditioned upon Applicant's conformity to the terms, conditions, and rules prescribed or adopted by the commission as discussed below.

3. Applicant's proposed telecommunications services are in the public interest. The commission recognizes that additional service providers in the State's telecommunications market increase competition and provide consumers with added options to meet their needs. As noted by the Consumer Advocate, Applicant's proposed services are in the public interest as "[t]he introduction of effective competition in the telecommunications industry is desirable to achieve the benefits that would not be present in a monopolistic environment."¹²

Based on the foregoing, the commission concludes that Applicant should be granted a COA to provide intrastate telecommunications services within the State as a reseller, as described in its Application.

1.

Consumer Advocate's Recommendations
Regarding Applicant's Request for a COA

The Consumer Advocate recommends that the commission, on its motion, waive certain statutory requirements. However, as noted by the Consumer Advocate, HAR § 6-80-136 already authorizes the waivers requested by the Consumer Advocate pursuant to HAR § 6-80-135. Specifically, HAR § 6-80-136 states, in relevant part:

¹²CA's Statement of Position, at 4.

Unless ordered otherwise by the commission, the following regulatory requirements of chapter 269, HRS, for the provision of intrastate telecommunications services by telecommunications carriers other than the incumbent carrier are waived

HAR § 6-80-136 (emphasis added).

In the present docket, Applicant seeks to provide resold telecommunications services in the State, and is not the incumbent carrier. Because the waivers recommended by the Consumer Advocate pursuant to HAR § 6-80-135 are fully contemplated by HAR § 6-80-136, specific authorization or waiver of these requirements is not necessary.

Related to its waiver recommendations, the Consumer Advocate also recommends that the commission require Applicant to: (1) file a separate tariff for each proposed new service; (2) maintain its financial records in accordance with generally accepted accounting principles; (3) make information from its records and books pertaining to intrastate telecommunications operations in the State available to the commission and the Consumer Advocate upon request on a timely basis; and (4) comply with the other exception requirements set forth in the subject rule that are not waived. The first two recommendations are incorporated in HAR § 6-80-136, and therefore, commission consideration of these recommendations is unnecessary. The third recommendation essentially modifies the otherwise applicable language of HAR § 6-80-136(3) to require Applicant to provide copies of its records and books upon the Consumer Advocate's request, in addition to the commission's request. The commission determines that because the

Consumer Advocate has several discovery mechanisms available to it, an order that allows the Consumer Advocate to request copies of Applicant's records and books in conjunction with the waiver provisions of HAR § 6-80-136 is not necessary or warranted at this time. With respect to the Consumer Advocate's fourth recommendation, because this requirement would exist regardless of a commission order containing such an instruction, the commission determines that a commission order on this issue is not necessary.

2.

Tariff Revisions

As noted above, Applicant filed an updated tariff on January 22, 2007 in which it incorporated the changes recommended by the Consumer Advocate in its Statement of Position. The commission finds that Applicant's revisions to its tariff, based on the Consumer Advocate's tariff revision recommendations, are reasonable and proper. Moreover, the commission finds certain other tariff revisions to also be appropriate. Thus, the commission concludes that Applicant's tariff should be revised as follows:

1. HAWAII PUC TARIFF NO. 1, Original Page No. 8, Section 1.0, Technical Terms and Abbreviations: "Commission" should be defined as the State of Hawaii Public Utilities Commission.

Section 2.6.3, Credit Allowance: This section should be revised to conform with HAR § 6-80-103(b), as follows:

Credit for failure of services shall be allowed only when such failure is caused by or occurs due to causes within the control of the Company or in the event that the Company is entitled to a credit for failure of the facilities of the Company's Underlying Carrier used to furnish the service; provided that, if service is interrupted by a natural or other disaster beyond the control of the Company, the Company shall make adjustments and refunds to its affected customers if service is not restored within forty-eight hours.

B.

Transfer of Control

HRS § 269-16.9 allows the commission to waive regulatory requirements applicable to telecommunications providers if it determines that competition will serve the same purpose as public interest regulation. Specifically HAR § 6-80-135 permits the commission to waive the applicability of any of the provisions of HRS chapter 269 or any rule, upon a determination that a waiver is in the public interest.

In this docket, the commission finds that Applicant is a non-dominant carrier in the State. The commission also finds that the proposed transfer of ownership is consistent with the public interest, and that competition, in this instance, will serve the same purpose as public interest regulation. Thus, the commission concludes that the requirements of HRS §§ 269-7(a), 269-17, and 269-19 should be waived, to the extent applicable,

with regard to the matters in this docket, pursuant to HRS § 269-16.9 and HAR § 6-80-135. Similarly, based on the findings and conclusions stated above, the commission will also waive the provisions of HAR §§ 6-61-101 and 6-61-105, to the extent that the Supplemental Application fails to meet any of the filing requirements stated therein.

III.

Orders

THE COMMISSION ORDERS:

1. Applicant is granted a COA to provide intrastate telecommunications services in the State as a reseller, as described in its Application.

2. As the holder of a COA, Applicant shall be subject to all applicable provisions of HRS chapter 269; HAR chapters 6-80 and 6-81; any other applicable State laws and commission rules; and any orders that the commission may issue from time to time.

3. Applicant shall file its proposed tariffs in accordance with HAR §§ 6-80-39 and 6-80-40. Applicant's tariffs shall comply with the provisions of HAR chapter 6-80. In the event of a conflict between any tariff provision and State law, State law shall prevail.

4. Applicant shall conform its initial tariff to the applicable provisions of HAR chapter 6-80, by, among other things, incorporating the tariff revisions set forth in Section II.A.2 of this Decision and Order. An original and eight

(8) copies of the initial tariff, with the noted revisions, shall be filed with the commission, and two (2) additional copies shall be served on the Consumer Advocate. Applicant shall ensure that the appropriate issued and effective dates are reflected in its tariffs.

5. Within thirty (30) days from the date of this Decision and Order, Applicant shall pay a public utility fee of \$60, pursuant to HRS § 269-30. The business check shall be made payable to the Hawaii Public Utilities Commission, and sent to the commission's office at 465 S. King Street #103, Honolulu, HI 96813.

6. Within thirty (30) days from the date of this Decision and Order, Applicant shall also pay a telecommunications relay service ("TRS") contribution of \$10.00, established pursuant to: (A) HRS § 269-16.6; and (B) Decision and Order No. 22536, filed on June 16, 2006, in Docket No. 2006-0126. The business check shall be made payable to "Hawaii TRS", and sent to the Hawaii TRS Administrator, Solix, Inc.,¹³ 80 S. Jefferson Road, Whippany, NJ 07981. Written proof of payment shall be sent to the commission.

7. As to the proposed transfer of customers from Acceris and New Access to Applicant, in compliance with 47 CFR § 64.1120(e) and HAR § 6-80-123, Applicant shall provide notice to affected customers of the transfer at least thirty (30) days prior to the transfer, and shall file a copy of the customer notification with the commission and Consumer Advocate.

¹³Solix, Inc. was formerly known as NECA Services, Inc.

As represented by Applicant, Acceris and New Access shall then surrender their authorizations. Prior to surrendering their authorizations, Acceris and New Access shall file any annual financial reports and pay any applicable public utility fees due and owing to the commission.¹⁴

8. Failure to promptly comply with the requirements set forth in paragraphs 3 to 7, above, may constitute cause to void this Decision and Order, and may result in further regulatory action, as authorized by law.

9. With respect to the proposed change in ownership of Applicant described in Applicant's Supplemental Application filed on February 14, 2007, the requirements of HRS §§ 269-7(a), 269-17, and 269-19, to the extent applicable, are waived.

10. The filing requirements of HAR §§ 6-61-101 and 6-61-105, to the extent applicable, are also waived.

¹⁴See Decision and Order No. 22560, filed on June 26, 2006, in Docket No. 00-0208, at 3 n.5.

DONE at Honolulu, Hawaii JUN 20 2007.

PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By Carlito P. Caliboso
Carlito P. Caliboso, Chairman

By John E. Cole
John E. Cole, Commissioner

APPROVED AS TO FORM:

Kaiulani Kidani Shinsato
Kaiulani Kidani Shinsato
Commission Counsel

2006-0471.eh

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Decision and Order No. 23499 upon the following parties, by causing a copy hereof to be mailed, postage prepaid, and properly addressed to each such party.

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DATED: JUN 20 2007